

The Retailers' Occupation Tax Act, 35 ILCS 120/1 et seq. (2000 State Bar Edition), imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. (This is a GIL.)

May 14, 2002

Dear Xxxxx:

This letter is in response to your letter dated April 12, 2002. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), which can be found on the Department's website at [www.revenue.state.il.us/Laws/regs/part1200/](http://www.revenue.state.il.us/Laws/regs/part1200/).

In your letter, you have stated and made inquiry as follows:

Thank you for discussing my questions regarding with the Illinois retailers' occupation and use taxes with me. I write to confirm my understanding of our conversation.

As I explained on the phone, my first question generally concerns the tax base for the Illinois retailer's occupation and use taxes. I located § 120/2 of the Illinois statutes which imposes the retailers' occupation tax on 'persons engaged in the business of selling at retail tangible personal property.'<sup>1</sup> 'The tax is imposed at the rate of 6.25% of *gross receipts* from sales of tangible personal property made in the course of business.'<sup>2</sup> The term 'gross receipts' means 'the total selling price or the amount of such sales, hereinbefore defined.'<sup>3</sup> The terms 'amount of sale' and 'selling price' both mean 'the consideration for a sale valued in money whether received in money or otherwise, including cash, credits, property,..., and services....'<sup>4</sup>

I also understand that Illinois imposes its use tax on the 'privilege of using in [Illinois] tangible personal property purchased at retail from a retailer,...'<sup>5</sup> The tax rate for the Illinois use tax is '6.25% of either the selling price or the fair market value, if any, of the tangible personal property.'<sup>6</sup> 'In all cases where property functionally used or

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<sup>1</sup> 35 Illinois Compiled Statutes § 120/2.

<sup>2</sup> 35 Illinois Compiled Statutes § 120/2-10, (emphasis added).

<sup>3</sup> 35 Illinois Compiled Statutes § 120/1.

<sup>4</sup> 35 Illinois Compiled Statutes § 120/1.

<sup>5</sup> 35 Illinois Compiled Statutes § 105/3. A retailer maintaining a place of business in Illinois is required to collect the tax from the buyer and remit it to the State. 35 Illinois Compiled Statutes § 105/3-45.

<sup>6</sup> 35 Illinois Compiled Statutes § 105/3-10.

consumed is the same as the property that was purchased at retail, then the tax is imposed on the selling price of the property.<sup>7</sup>

Based on these provisions, my question is whether a retailer can reduce its taxable 'selling price' for tangible personal property (for purposes of the retailers' occupation and use taxes) below its purchase price for the property, thereby lowering the tax base? In other words, can a retailer sell its products for less than its cost and reduce the tax base? And if so, by how much can the sales price go below cost?

For instance, assume that an Illinois retailer purchases taxable tangible personal property for \$100. The retailer issues an Illinois sale for resale exemption certificate to the seller because the retailer intends to resell the tangible personal property. The retailer resells the tangible personal property to a buyer in Illinois for \$80, 80% of the retailer's cost. What is the taxable selling price of the tangible personal property in the transaction between the retailer and the buyer? Should the retailer charge tax based on the price of \$80, or on some other price? Would it make any difference in your analysis if the retailer and the buyer are wholly affiliated companies? If so, how? Will the Department respect prices charged between affiliated companies even if those prices are below cost? Is there some selling price level below cost (70%, 60%, 50%, etc.) that the Department will not respect? Does the Department have a policy on this issue?

Based on my conversation with you and my research, it is my understanding that Illinois will impose Illinois taxes based on the actual selling price of the retailer, even if that selling price is below cost. It is my understanding that except in cases of an outright gift (i.e. selling price of \$0), your policy is that a retailer can set its selling price at any level it selects, such as buying items for \$100 and reselling them for 1 cent. I also understand that your answer and analysis would not change even if the retailer is reselling the items (below cost) to a wholly affiliated buyer, such as wholly owned subsidiary. Would you please confirm that my understanding of Illinois tax law is correct?

My next question concerns Illinois' policy on taxing packaging materials. Based on our conversation, it is my understanding that Illinois does not impose its taxes on sales of packaging materials, such as paper or plastic bags purchased by a retailer. For example, a retailer such as AAA department store may purchase paper or plastic bags it provides to its customers (for use in carrying out any items the customers purchased) without becoming liable for any Illinois taxes. Is my understanding of Illinois' policy on packaging materials correct?

I appreciate your consideration of this matter and I look forward to receiving your response. Please call me if you have any questions.

The Retailers' Occupation Tax Act, 35 ILCS 120/1 et seq. (2000 State Bar Edition), imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. The tax is measured by the seller's gross receipts from such sales made in the course of such business. "Gross receipts" means the total selling price or the amount of such sales. When Illinois retailers sell tangible personal property to customers for a particular dollar amount, they have made sales subject to the Retailers' Occupation Tax. The

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<sup>7</sup> 35 Illinois Compiled Statutes § 105/3-10.

retailers must pay Retailers' Occupation Tax to the Department based upon their gross receipts, or actual amount received, from the sales of the tangible personal property.

Section 3 of the Illinois Use Tax Act, 35 ILCS 105/3, imposes a tax upon the privilege of using in this State tangible personal property purchased at retail from a retailer. This would include items that normally are used by stores such as trays, cleaning supplies and cash register tapes. As stated above, Retailers' Occupation Tax is imposed upon gross receipts of sellers and the tax acts contain provisions that require the retailer to collect the complementary Use Tax from the customer. This in effect reimburses the retailer for his Retailers' Occupation Tax liability. When a retailer purchases consumable supply items from vendors who do not collect Illinois tax, the purchaser should self-assess the Use Tax and remit it directly to the Illinois Department of Revenue.

Please find enclosed a copy of the Department's regulation governing "Sales of Containers, Wrapping and Packing Materials and Related Products," 86 Ill. Adm. Code 130.2070. The sale of tangible personal property for the purpose of resale is not taxable so long as the purchaser provides the seller with a Certificate of Resale in accordance with 86 Ill. Adm. Code 130.1405, enclosed. Please note that sellers of containers to purchasers who sell tangible personal property contained in such containers to others are deemed to make sales of such containers to purchasers for purposes of resale, the receipts from which sales are not subject to the Retailers' Occupation Tax, if the purchasers of such containers transfer the ownership of the containers to their customers together with the ownership of the tangible personal property contained in such containers. Please see 86 Ill. Adm. Code 130.2070, enclosed.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at [www.revenue.state.il.us](http://www.revenue.state.il.us). If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b).

Very truly yours,

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MAJ:msk  
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